United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

#1

75-1388

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MAURICE BURSE,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE

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STATUTE.

In The

United States Court of Appeals

For the Second Circuit

Docket No. 75-1388

UNITED STATES OF AMERICA,

Appellee,

v.

MAURICE BURSE,

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BRIEF OF APPELLEE

Statement of Issues Presented for Review

1. Was it proper for the court to refuse the defendant's requested charge regarding the burden of proof respecting an "alibi" defense and to refuse to charge the jury regarding Sections 3 and 4 of Title 18 United States Code?

2. Was the identification testimony of Mrs. Anna Debose the result of an impermissively suggestive procedure?

3. Was the prosecutor's summation proper?

4. Did the procedures followed by the Government deprive the defendant of a fair trail?

5. Should this court dismiss this hearsay indictment?

Statement of Facts

This appeal arises from the conviction after jury trial of defendant, Maurice Burse, for unlawfully conspiring to rob

the Manufacturers & Traders Trust Company Bank, Ridge Road Office, Lackawanna, New York on July 30, 1974. It comes before this Court through the following chronicle of events. On August 28, 1974, the Grand Jury in the Western District of New York returned a three-count Indictment relating to the robbery of approximately $410.00.

Named in the Indictment as defendants were Maurice Burse and Darrell DeBose; named as an unindicted co-conspirator was Gary Green, a juvenile. Count I charged conspiracy to violate Title 18, United States Code, §2113(b), Count II charged the substantive violation of Title 18, United States Code, §2113(b) and Count III charged the substantive violation of bank robbery by intimidation of Title 18, United States Code, §2113(a).

The Honorable John T. Curtin, Chief Judge for the Western District of New York, presided over the jury trial. The approximately two-month period of discovery was presided over by Magistrate Edmund F. Maxwell. On October 22, 1974, retained counsel was granted leave to withdraw with present counsel being appointed to represent Maurice Burse on October 29, 1974. On November 1, 1974, the government moved the action for trial and additional discovery proceedings thereafter were held and various related motions were decided by Magistrate Maxwell. An identification hearing was held on March 19, 1975 at which time government witness, Barbara Ramos, testified and the Court's Decision and Order denying Maurice Burse's motion to suppress was filed on July 10, 1975.

This case was set for trial on Judge Curtin's calendar on July 16, 1975 for August 12, 1975. On August 5, 1975, unindicted co-conspirator Gary Green was tried and convicted after a bench trial before Chief Judge Curtin on an Information charging him with unlawfully conspiring with Maurice Burse and Darrell DeBose to rob the same Manufacturers & Traders

Trust Company Bank on July 30, 1974. Defense counsel for Maurice Burse moved for and was granted a transcript of the testimony given in that case. Thereafter, trial of the instant matter commenced on September 23, 1975.

Following five days of testimony, the jury returned a verdict of guilty on Count I of the Indictment on October 2, 1975. The jury was polled and motions against the verdict and for a mistrial were made by defense counsel. Oral argument followed on October 31, 1975 and the decision denying all motions resulted on November 7, 1975. Judgment was entered on the verdict and Judge Curtin sentenced Maurice Burse to the custody of the Attorney General as a youthful offender, pursuant to Title 18, U.S.C., §5010(b). It is from this judgment and sentence that Maurice Burse appeals.

We now turn to a review of the evidence produced at trial which led to the conviction of the defendant and details the following scenario. On the night of July 29, 1974, Darrell DeBose was asked by Maurice Burse and Gary Green to come that evening to the School 12 park located at 14 Spruce Street, Buffalo, New York (Tr. 353, 354). It was there that Maurice Burse asked Darrell DeBose to rob a bank with Gary Green and himself (Tr. 357, 358). After Darrell Debose agreed, he was told by Maurice Burse that he would be the one who would enter the bank (Tr. 359).

At approximately 8:30 on the morning of Tuesday, July 30, 1974, Maurice Burse and Gary Green arrived at the home of Darrell DeBose (Tr. 360). Both Maurice Burse and Gary Green were permitted into the house by Mrs. Anna DeBose, the stepmother of Darrell DeBose, who sat and spoke with them for approximately five or six minutes (Tr. 225). As the three boys were leaving, Maurice Burse told Mrs. DeBose that they were going to Lackawanna "to see about a job" (Tr. 226).

All three proceeded to the house of the aunt of Gary Green on Walnut Street, Buffalo, New York and arrived there in ap-

proximately five minutes (Tr. 363). Maurice Burse and Gary Green entered the house and exited after about five minutes with a sawed-off-shotgun (Tr. *id.*). Approximately 25 minutes later, all three were on a bus going to Lackawanna, New York, proceeding to the house of Evon Wright at 40 Steelawanna, Lackawanna, New York (Tr. 364, 365). Evon Wright was present when Maurice Burse, Gary Green and Darrell DeBose arrived (Tr. 483). After approximately five minutes, Maurice Burse, Gary Green and Darrell DeBose left Evon Wright's house and arrived at the Ridge Road Branch of the M&T Bank about fifteen minutes hence (Tr. 484, 366). Darrell DeBose entered the bank through the side door with Maurice Burse who remained by that door (Tr. 366, 367). Shortly after 10:00 A.M., Darrell DeBose approached bank teller Helen Jurek at Cage No. 10, announced that there was a holdup and demanded that she give him all the money (Tr. 370, 371, 196). The teller emptied her drawer of bait money and gave him a few other bills during which time she was both nervous and afraid (Tr. 197). Darrell DeBose then ran out the Wilkes-Barre Street side entrance, and together with Maurice Burse, ran through a parking lot to meet Gary Green (Tr. 370, 371). While running to the parking lot through a yard located at 29 Wilkes-Barre Street, Maurice Burse was recognized by Barbara Ramos who knows him from the neighborhood (Tr. 539).

All three ran to the home of Evon Wright and remained there for two or three minutes (Tr. 371, 373). Both Maurice Burse and Gary Green then departed while Darrell deBose remained until approximately 4:30 P.M. (Tr. 373). After returning to Buffalo, Darrell DeBose met with Gary Green and received his share of the money (Tr. *id.*). Subsequently, on August 1, 1974, Gary Green was arrested on an unrelated felony robbery and was found in possession of two ten dollar bills listed as those on the bank list of money stolen in the robbery of the M&T Bank, Ridge Road Office, Lackawanna, New York on July 30, 1974 (Tr. 567).

Approximately three and one-half weeks thereafter, the Grand Jury, after an investigation, returned the Indictment against Maurice Burse, on which this case stands.

ARGUMENT.

A.

The facts of this case do not warrant the giving of the requested alibi instructions.

Defendant Maurice Burse complains of alleged error in the Trial Court's refusal to instruct on alibi as requested. However, the evidence of alibi introduced at trial was insufficient to warrant the giving of such a charge.

This Court has held that where there is not a proper request for an alibi instruction, the Trial Court need not give the instruction; *United States v. Coughlin,* F.2d, Slip. Op. 574, 766; 2900 (2nd Cir. 4/15/75); *United States v. Caci,* 401 F.2d 664, 670 (2nd Cir. 1968), cert. denied, 394 U.S. 917 (1969). A Trial Court also need not give the instruction if the alibi defense is not strong and where the Court has instructed the jury that the government must prove each element beyond a reasonable doubt. *United States v. Cole,* 453 F.2d 902, 906 (8th Cir. 1972), *cert. denied,* 406 U.S. 922 (1972); *United States v. Erlenbaugh,* 452 F.2d 967, 975 (7th Cir. 1971), *cert. granted,* 405 U.S. 973, *(aff'd. on different grounds),* 409 U.S. 239 (1972); *United States v. Mosley,* 450 F.2d 506, 511 (5th Cir. 1971), *cert. denied.*

The defendant sought to establish, through the testimony of his neighbor, Louise Stevens, his mother, Patricia Burse, and his brother, Craig Burse, that he was at his home between 9:00 A.M. and 12 noon on the day of the bank robbery, which had occurred between 10:00 A.M. and 10:30 A.M. Louise Stevens testified that the first time she saw the defendant on the day in question had been at approximately 12 noon while

she was "in the influence of alcohol" (Tr. 645, 646, 651). Craig and Patricia Burse's testimony amounted to no more than an accounting of defendant's presence at their home "off and on" for periods of time before 12 noon (Tr. 609, 691). Moreover, Patricia Burse testified that for herself, it is an approximately fifteen (15) minute walk from her home to the bank (Tr. 622). Government witness, Anna DeBose, stated that on the morning in question, the defendant was in her home at which time he informed her that he, Gary Green, and her stepson, Darrell DeBose, "were going to Lackawanna to see about a job" (Tr. 226). Barbara Ramos testified that she resides near the bank, knows Maurice Burse from the neighborhood, and saw him run past her shortly after the robbery occurred (Tr. 536, 540; 539; 537-539).

Clearly, the defendant did not produce an alibi for the time period in which the bank robbery occurred. Thus, where the defense alibi is not strong, the giving of the alibi instruction is not required. *United States v. Cole, supra,* at 906.

In addition thereto, it has been held that the alibi instruction need not be given where presence is not an element of the crime charged. *United States v. Erlenbaugh, supra* at 975; *United States v. Megna,* 450 F.2d 511, 512-513 (5th Cir. 1971), *rehearing denied* (12/30/71); *United States v. Beck,* 431 F.2d 536, 538 (5th Cir. 1970). If, in the present case, proof of alibi were found to be strong, it would appear that the Trial Court was required to charge the alibi instruction as to the substantive counts only, because of its erroneous charge to the jury that in order to convict Maurice Burse it must find that he personally took the money from and personally intimidated teller Helen Jurek (Tr. 828-830). However, the failure to do so clearly was not prejudicial error since defendant Maurice Burse was convicted of conspiracy alone for which presence is not an essential element. *United States v. Lee,* 483 F.2d 968, 970 (5th Cir. 1973).

a.

Intertwined in his discussion of the alibi instruction is defendant's complaint that the Trial Court did not charge the jury as to the elements of Section 3 and Section 4 of Title 18, United States Code. Defense counsel claims that these sections are of relevance to the credibility of Government witness, Evon Wright (D. Br. 20).

Instead, the Trial Court gave an instruction which did not strictly parrot defendant's request but nonetheless detailed factors relevant to the credibility of Evon Wright. This instruction included reference to the question of possible criminal conduct. It charged, in fact, that if the jury found

> . . . that she might have been charged with a particular crime, then in evaluating her testimony, to determine how much weight you should give to it, you may consider these factors (Tr. 819-820).

There can be no doubt that the Trial Court's instruction covers in substance the intent of defense counsel's proffered instruction.

What defendant sought in his requested instruction No. 12 was to have the Trial Court emphasize to the jury two possible offenses allegedly applicable to Evon Wright. The giving of the proffered charge most likely would have the effect of sidetracking the jury into a determination of the issue of her guilt which certainly was not before them. Such a charge would have led to confusion, not articulation, of the issues and properly was amended before presented to the jury.

B.

The testimony of Anna DeBose identifying defendant Maurice Burse properly was admissible.

Defendant erroneously contends that the testimony of Anna DeBose in which she identifies him as being present in

her home with Gary Green on the morning of the bank robbery should not have been allowed because her identification was the result of an impermissibly suggestive procedure used by the F.B.I. Clearly, Anna DeBose's in-court identification of the defendant was the result of the aforementioned meeting with the defendant during which she talked with him for approximately five or six minutes (Tr. 225).

At trial Anna DeBose testified that it was not possible that it was someone other than the defendant Maurice Burse who came to her house on the morning of the bank robbery (Tr. 246). There is some confusion in the record as to whether or not photographs of Gary Green and Maurice Burse were shown to Anna DeBose by F.B.I. Special Agent Richard Davidson at an interview with her approximately one week after the bank robbery. However, out of the presence of the jury, F.B.I. Special Agent Davidson testified that the only photograph which he showed her was the bank surveillance photograph of Darrell DeBose and that he had no conversation with her about defendant Maurice Burse (Tr. 283-296).*

Even assuming *arguendo* that Anna DeBose was shown photographs of Gary Green and of Maurice Burse, it is overwhelmingly evident that her identification of the defendant was solely the result of her observation of him at the meeting between herself and the defendant on the morning of the robbery. As Anna DeBose testified, she didn't pay attention to any pictures and she knew the defendant not by his photograph but "by the face" (Tr. 269, 272). *See e.g. United States v. Tramunti,* F.2d (2nd Cir. 1972).

Lastly, it should be pointed out that the Trial Court gave immediate and lengthy charges to the jury on the

* Anna DeBose's confusion as to what had occurred during the meeting with the F.B.I. agents is evident. During recross-examination she stated, "I never been in nothing like this before in my life." (Tr. 267).

identification testimony of Anna DeBose and cautioned them extensively as to the possibilities of suggestibility relating to her identification testimony (Tr. 317-321, 914-915).

In light of the instructions given by the Trial Court and in light of the clear independent basis for Anna DeBose's identification of the defendant as reflected above, her testimony properly was admissible.

C.

The Government's summation was proper.

Defendant argues that he was prejudiced by specific remarks made during the Government's summation. An analysis of those instances alleged clearly reveal defendant's contentions to be frivolous.

Significantly, in the landmark case of *Berger v. United States*, 295 U.S. 78 (1935), the Supreme Court of the United States directed that a prosecutor is to proceed with earnestness and vigor (*id.* at 88). Judge Learned Hand of this Circuit, in a post-*Berger* opinion, observed that truth is not likely to emerge

> . . . if the prosecution is confined to such detached exposition as would be appropriate in a lecture, while the defense is allowed those appeals *in misericordiam* which long custom has come to sanction. *United States* v. *Wexler*, 79 F.2d 526, 530 (2nd Cir. 1935), *cert. denied*, 297 U.S. 703 (1936).

When viewed in context and not in the detached form as presented by defendant, it is evident that the complained of remarks are well within the bounds of prosecutorial propriety and responsive to the arguments of defense counsel. *See United States v. Caniff*, 521 F.2d 565, 571 (2nd Cir. 1975). *See also United States v. Wilner*, 523 F.2d 68, 72 (2nd Cir. 1975).

In his summation, defense counsel stated that prior to trial he talked with Government witness Darrell DeBose in the Erie County Jail and queried the jury as to why Darrell DeBose was not then in jail (Tr. 789, 790, 760, 761). This was an attempt to go by way of the back door into the area of prior acts of the witness not resulting in conviction which the Trial Court specifically ruled is prohibited (Tr. 410). Furthermore, the Government's response thereto was intended to negate the inference argued by defense counsel that it was a party to a sentencing agreement with Darrell DeBose (Tr. 759, 760).

The defendant next urges this Court to find prejudice and prosecutorial impropriety from a statement made relating to an increase in the number of bank robberies (D. Br. 25). Reference by a defense counsel to this statement is taken entirely out of context. Repeatedly, defense counsel characterized witness Darrell DeBose as a "liar", and argued that the government was privy to this deceit (Tr. 759, 760, 763-765). In an effort to defend the integrity of the Government and to place defendant's attack into proper perspective, it was stated that

> . . . the government must take its witnesses as it finds them. It has no choice in the matter. Unfortunately, there are people who rob banks and it appears to be more and more people all the time. (Tr. Summ. 17).

Certainly this rebuttal was suitable to the occasion and of the type which is entitled to be made. *See United States v. LaSorsa,* 480 F.2d 522, 526 (2nd Cir. 1973), *cert. denied,* 414 U.S. 855 (1973); *United States v. Benter,* 457 F.2d 1174, 1176-1177 (2nd Cir. 1972), *cert. denied,* 409 U.S. 842 (1972). In addition, Judge Mansfield appropriately points out that it is time that steps be taken to insure that defense counsel will refrain from intentional conduct which both tends to goad prosecutors and prevent justice. *United States v. DeAngelis,* 490 F.2d 1004,

1011 (2nd Cir. 1974), *cert. denied,* 416 U.S. 956 (1974).* Nevertheless, the Trial Court propounded curative instructions to the jury sufficient to negate any possible prejudice inuring to the defendant from any reference to other bank robberies (Tr. Summ. 18-19).

Still another claim argued by defendant is that the Government sought to comment to the jury on his failure to take the stand by stating, "the defendant didn't tell you about all the truths" (D. Br. 25). Once again, the challenged statement is taken out of context.** During summation, it was pointed out to the jury clearly and succinctly that the phrase, "the defendant" referred to defense counsel (Tr. Summ. 23, 24, 26). By no stretch of the imagination does the reference to defendant, when viewed in the context of the entire summation, become tantamount to a comment on defendant's failure to take the stand. It amounted to nothing more than a general comment on defense counsel's summation as to the government's case. See *United States v. Nasta, supra* at 285. Any other interpretation would be "far-fetched". *United States ex rel. Conomos v. LaVallee,* 363 F.Supp. 994, 1003 (S.D.N.Y. 1973);

* In the same concurring opinion, it was pointed out that in at least three of this Court's opinions respecting the prosecution's summation, the prosecutor's remarks were provoked by or responsive to improper statements made by defense counsel. See *United States v. Bivona,* 487 F.2d 443, 445-448 (2nd Cir. 1973); *United States v. Santana,* 485 F.2d 365, 370-71 (2nd Cir. 1973); *United States v. LaSorsa,* 480 F.2d 522, 526 (2nd Cir. 1973), *cert. denied,* 414 U.S. 855 (1973).
In conjunction with the aspect of defense conduct at trial, defense counsel quipped to the Government's witness, Darrell DeBose, as he removed chewing gum from his mouth, "You didn't stick it on the rail there, did you?" (Tr. 357).

** When defense counsel objected to the prosecutor's comments, the Trial Court proceeded to give curative instructions as to the concept of burden of proof. Defense counsel did not object nor request any other instructions. Consequently, the appellant should now be precluded from raising on appeal the claim that the United States Attorney was commenting on the defendant's failure to take the stand in violation of his Fifth Amendment rights. See *United States v. Nasta,* 398 F.2d 283, 285 (2nd Cir. 1968).

See also United States v. Cox, 428 F.2d 683, 688 (7th Cir. 1970), *cert. denied*, 400 U.S. 881 (1970); *United States v. Shartner*, 426 F.2d 470, 477-478 (3rd Cir. 1970); *United States ex rel. Leak v. Follette*, 418 F.2d 1266, 1268 (2nd Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970). Moreover, even where the summation references to the defendant may be ambiguous, cautionary instruction to the jury will suffice to avoid possible prejudice. *United States v. Nasta, supra*, at 285. Such an instruction was given by the Trial Court (Tr. Summ. 25, 26). Furthermore, if defendant's characterization as error were to be accepted, it would be harmless. cf. *United States ex rel. Satz v. Mancusi*, 414 F.2d 90, 92 (2nd Cir. 1969).

Defendant Maurice Burse additionally argues prejudice from an attempted reference, during the Government's summation, to a written statement of witness Darrell DeBose that was not in evidence (D. Br. 25). It suffices to say that defense counsel stated in his summation that the jury had a four-page statement from witness Darrell DeBose, inferring that the statement was in evidence when it was not (Tr. 762). In any event, the Court's instructions to the jury that the four-page statement was not in evidence and should not be speculated upon as to what it contains effectively rebuts any argument of possible prejudice (Tr. Summ. 27).

Apparently, without regard to the acknowledged purpose and function of closing arguments, defendant believes that the summarization of testimony of government witness Barbara Ramos during summation is improper, and consequently, urges error. In his summation, defense counsel recalled for the jury certain testimony of witness Barbara Ramos (Tr. 776, 778). Yet, now he attempts to deny the Government that same right. Furthermore, the defendant does not allege any inaccuracy in the Government's summarization. Under the circumstances, defendant's argument is frivolous, spurious and without basis in law or in fact.

The defendant next criticizes the Government's argument made to explain the absence of defendant's picture from the bank surveillance films. He postulates that such was conjecture, speculation and surmise (Tr. Summ. 36, 37; D. Br. 25). However, the inference argued is supported by the evidence and therefore is proper. It is a well-established principle in this Circuit that both defense counsel and counsel for the Government are permitted to argue within broad limits, the inferences they wish the jury to draw from the evidence. *See United States v. Dibrizzi*, 393 F.2d 642, 646 (2nd Cir. 1968). During trial, testimony established that the surveillance cameras as depicted in the bank diagram (Government's Exhibit No. 3) were not placed so as to represent the set angles as existed on the day of the bank robbery (Tr. 127, 134-135). In summation, defense counsel urged the jurors to infer, from the absence of a photograph of the defendant in the bank surveillance film, that the defendant had not been present during the robbery (Tr. 794, 795). On the other hand, it was urged by the Government that the jury could draw the inference that the defendant was not in the range of the cameras when they became activated (Tr. Summ. 36, 37). Surely, such argument is permissible. *See United States v. Gerry*, 515 F.2d 130, 144 (2nd Cir. 1975); *United States v. White*, 486 F.2d 204, 207 (2nd Cir. 1973), *cert. denied*, 415 U.S. 980 (1974); *United States v. Lacey*, 459 F.2d 86, 91 (2nd Cir. 1972); *United States v. Colasurdo*, 453 F.2d 585, 595 (2nd Cir. 1971), *cert. denied*, 406 U.S. 917 (1972).

Perhaps, defendant's most desperate argument concerns the allegation that the Government misrepresented the testimony of defendant's alibi witness, Louise Stevens, when it mentioned that she was under the influence of alcohol on the day in question and on the day that she testified (Tr. 39, 40). Louise Stevens testified at trial that she was "in the influence of alcohol" on the day the bank robbery occurred (Tr. 645-647); that she drinks every day 365 days a year (Tr. 651); and

not = "under the influence"

that she had whiskey on the day of her direct and cross-examination (Tr. 661). To say that there was an attempt to deceive the jury in light of Louise Stevens' own testimony defies reason. The Trial Court, *sua sponte*, during argument interjected its recollection of the testimony and then admonished the jury that they were to rely on their recollections of what actually transpired (Tr. Summ. 39, 40, 41). In light thereof, there can be no prejudice to defendant.

Finally, defendant criticizes the Government for its attempt to point out that the evidence presented established, in law and in fact, the Government's case and that the defendant would, as it did, have to argue the credibility of the Government's witnesses (Tr. Summ. 41). Certainly, this is within the province of rebuttal argument and in light of the instructions given, can in no way be prejudicial (Tr. Summ. 42).

In conclusion, it is evident that the Government's Summation was within the bounds of propriety and followed the guidelines of *Berger* and this Court in letter and in spirit.* We recognize that our foremost priority is to seek justice and no convictions. Whatever errors that may be found to exist are clearly "harmless beyond a reasonable doubt", thereby not constituting reversible error. *Chapman v. California*, 386 U.S. 18, 24 (1967).

D.

The defendant was afforded fair trial.

The next attack by defendant is directed to procedures allegedly used to deny him a fair trial. The case against the

* It is unfortunate, but the cases cited by defendant of *United States v. Drummond*, 481 F.2d 62 (1973) and *United States v. Miller*, 478 F.2d 1315 (1973) involve the same Assistant U.S. Attorney, as does *United States v. Fernandez*, 480 F.2d 726 (1973), who failed to heed this Court's admonitions and should be so considered.

defendant was presented vigorously, but fairly and his argument is without merit.

It is our intention to address those points not previously discussed in this brief and as to those issues not now covered, our discussions within are responsive.

?!

Defendant has the temerity to argue that he was denied a fair trial because the government did not turn over to him until the eve of trial the information that government witness, Darrell DeBose, previously had made the statement that a Jimmy Barner robbed the bank. His approach is couched in terms of a denial of *Brady* material. This attack is totally specious.

This Circuit specifically does not require under *Brady* the government to make a witness' statement known to a defendant who has a notice of the essential facts which would enable him to call the witness and thus take advantage of any exculpatory testimony that might be furnished. *United States v. Stewart*, Slip. Op. 769, 2532 (2nd Cir. 3/26/75); *Williams v. United States*, 503 F.2d 995, 998 (2nd Cir. 1974) *(per curiam); United States v. Tramunti*, 500 F.2d 1334, 1349-50 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974); *United States v. Brawer*, 496 F.2d 703 (2nd Cir. 1974), *cert. denied*, 419 U.S. 105 (1974); *United States v. Ruggiero*, 472 F.2d 599, 604 (2nd Cir. 1973), *cert. denied*, 412 U.S. 939 (1973). In the instant case, defendant had notice of the aforementioned statement from on or about August 5, 1974—more than six (6) weeks prior to his trial. Additionally, he indicated in open court before trial commenced, that he was neither surprised nor prejudiced by this statement and further declined an opportunity offered by the District Court to delay trial (Tr. 61). Surely, this puts to rest any question of *Brady* violations or impermissible procedure.

Additionally, the defendant is critical of the government's cross-examination of Craig Burse. The question posed related

to whether or not Craig Burse notified the police of information he had regarding his brother's alibi. No effort whatsoever was made to imply that the witness was required to make a report to the police. Simply stated, this was relevant to the witness' credibility in that it stands to reason that one might advise authorities where another is unjustly accused. The Trial Court, therefore, erred in denying the Government its right to pursue this line of cross-examination. Any arguable error resulting from the Government's questioning was cured by the instruction given by the Trial Court (Tr. 700).

In a footnote to his brief, defendant complains of but does not show prejudice resulting from the issuance of the subpoenas (D. Br. 27). Moreover, as acknowledged by defense counsel, only the individuals subpoenaed, not the defendant, have standing to complain (Tr. 26). What follows, however, is a brief discussion to advise this Court as to the circumstances surrounding the Government's issuance of subpoenas.

It is common knowledge that the Western District's trial calendar is extremely congested. When the matter of subpoena practice first was raised by the defendant, the Trial Court advised him that it had directed the government in July of 1975 to be ready to try its cases, including the related case of *Gary Green*, on one day's notice and found nothing wrong or prejudicial with the issuance of the August subpoenas (Tr. 17, 18). The defendant now is complaining of "scores" of issued subpoenas (D. Br. 28). It is clear that defense counsel's original complaint to the Trial Court concerned approximately fourteen (14) (Tr. 22-23). In addition, he fails to mention that of these subpoenas most were duplicates (Tr. 23) and further, the early issuance question, in part, was compounded by his request for adjournment to obtain the *Gary Green* trial transcript (Tr. 18). Finally, the defendant not only had access to the Government's witnesses or the benefit of their testimony in the trial of the related case of *Gary Green*,

but in addition thereto, had interviewed the defense witnesses subpoenaed by the Government. Thus, as is evident, no evidence resulted to him thereby.

E.

The indictment of the defendant, based on direct and hearsay evidence, is proper and should not be dismissed.

Defendant's final argument is a demand for dismissal of the indictment because it was based upon hearsay evidence. This was raised by defendant before both the Trial Court and the Magistrate (Tr. 42, 43). In each instance it was denied after in camera inspection of the Grand Jury transcript and, in the absence of clear error, the prior decisions should be affirmed.

The landmark opinion of *Costello v. United States* has established that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act" 350 U.S. 359, 362 (1956). Furthermore, the *Costello* Court declined to exercise its supervisory powers to establish a rule permitting defendants to challenge indictments on the ground that they are not supported by adequate evidence because

> Defendants are not entitled. . .to a rule which would result in interminable delay but add nothing to the assurance of a fair trial (*id.* at 364).

Nonetheless, this Court has held that although indictments based totally on hearsay are permissible, dismissal may be considered if the defendant could show that there is a "high probability" that with eye-witness rather than hearsay testimony the grand jury would not have indicted, or, if the Grand Jury is "misled into thinking it is getting eye-witness testimony from the agent whereas it is actually being given an account whose hearsay nature is concealed. . . .". *United*

States v. Leibowitz, 420 F.2d 39, 42 (2nd Cir. 1969); *United States v. Estepa*, 471 F.2d 1132, 1137 (2nd Cir. 1972). Moreover, this Court has stated that *Estepa* was not intended to modify broadly the rule recognizing the acceptability of hearsay evidence in grand jury proceedings. Rather,

> . . .it was intended as manifest warning that it is impermissible to have law enforcement officers, who have no first-hand knowledge of the subject the grand jury is investigating, testify as if they possessed that knowledge. *United States v. Harrington*, 490 F.2d 487, 489 (2nd Cir. 1973).

Here, the only hearsay testimony related to the Grand Jury was that of the F.B.I. Agent Thomas J. Colombell. Agent Colombell testified that he conducted an interview with witness Darrell DeBose in which he took a statement from him (Tr. 45). This statement was read to the Grand Jury and Agent Colombell further testified that Darrell DeBose orally informed him that the two individuals to whom he referred in his statement were Maurice Burse and Gary Green (*id.*). In response to the queries of defendant in his brief (D. Br. 34), the original written statement of Darrell DeBose did not contain the names Maurice Burse and Gary Green but an explanation was given to the Grand Jury as to why those names were omitted (G.J. 15-17, 19-22, T. Colombell). The remaining testimony of Agent Colombell related to the results of interviews conducted by himself and to an interview with Evon Wright which the Grand Jury was told was conducted by F.B.I. Agents Davison and Lander (G.J. 10, T. Colombell). This procedure clearly was not misleading, was accurate and is in keeping with proper Grand Jury procedure under *Estepa, supra.*

Defendant also argues that if certain eye witnesses had testified, there exists a high probability that the Grand Jury would not have indicted him. This is without any basis in fact.

To begin with, Agent Colombell accurately recounted the interviews with Darrell DeBose and Evon Wright. The trial record verifies this (Tr. 352-376; 483-485). It is clear from Barbara Ramos' testimony that she would have identified Maurice Burse as the male who ran past her on the day of the robbery (Tr. 535-560; see esp. 549-552).

The defendant's other contentions equally are without merit. He claims that since teller Helen Jurek would have testified at the Grand Jury that she only saw one man robbing the bank, that the inference to be drawn is that the defendant was not involved. Furthermore, he claims that Anna DeBose would not have been able to identify him. In light of their testimony at trial, it is improbable that the Grand Jury would have found that the defendant was not a participant in the bank robbery.

Lastly, defendant postulates that had it been called to the attention of the Grand Jury that Darrell DeBose first told the F.B.I. that a "Jimmy Barner" committed the bank robbery, that they would not have voted the indictment against him. This, too, is without merit. We know that "Jimmy Barner" was a fiction (Tr. 399-400). The mere fact that Darrell DeBose's initial statement that a "Jimmy Barner" was involved in the three-man conspiracy does not exculpate Maurice Burse since the Grand Jury reasonably would have determined him to have been one of the other two participants as did the petit jury which convicted him after listening to all of the testimony including that relating to a "Jimmy Barner."

Clearly, in light of all of the above, it is not highly probably that the Grand Jury would have exonerated defendant Maurice Burse.

F.

Closing Remarks.

Due to the highly partial account of prior proceedings presented to this Court in behalf of the defendant at the outset of his brief, we have been prompted to this discussion in an effort to establish perspective.

Defense counsel, before proceeding with argument, attempts to establish a scenario for his allegations of prejudice and error. He commences with an attack on the credibility of the Government's witness and concludes with reference to comments critical of the Government made by the Trial Court. It is to these latter remarks that we will address ourselves and, as to the former, the discussions within suffice.

Specifically, in the preliminary observation section of his brief, defense counsel urges upon this Court the post-trial comments of the Trial Court that the evidence was not overwhelmingly against the defendant (D. Br. 15). It should be noted that at a post-trial appearance before the Trial Court, defense counsel, with whom we concur, conceded that the trial record did not support a judgment of acquittal (Tr. 950).

In its post-trial findings, the Trial Court characterized the testimony of Government witness Barbara Ramos identifying defendant Maurice Burse as "thin" and perhaps mistaken (Tr. 953). The weight of the evidence is to the contrary. In no uncertain terms, Barbara Ramos testified that she knew the defendant from the neighborhood (Tr. 549); that it was not possible that it was anyone other than the defendant whom she saw on the morning of the robbery (Tr. 549, 552); and that she even picked up the defendant while he was hitchhiking and spoke with him about her testifying for the Government in his upcoming trial (Tr. 555). She further testified that Maurice Burse was approximately five foot five to five foot six (Tr. 548, 556). This was corroborated by the testimony of

Government witness Evon Wright (Tr. 499, 500) and by defendant's mother (Tr. 617-619). Furthermore, the Trial Court commented that it also had difficulty with the testimony of Anna DeBose (Tr. 955). She too identified the defendant and unequivocally stated that she knew the defendant "by the face" (Tr. 269).

The defendant proceeds to note that the Trial Court concluded that in the instant case "hearsay testimony" was presented to the Grand Jury (D. Br. 15). Certainly there is nothing intrinsically improper with the presentation of hearsay testimony to the Grand Jury as evidenced by the argument of the Government in its brief. In fact, as previously pointed out, both the Trial Court and the United States Magistrate after *in camera* inspection of the Grand Jury minutes determined there to be no improprieties and no resulting prejudice to the defendant (Tr. 42, 43).

Furthermore, the defendant points out the Trial Court's comment that the Government did not comply with the mandates of *Brady*. This determination is without basis in fact or in law. It is undisputed that the Government did make available to the defendant information favorable to him at various times prior to trial (Tr. 16). Furthermore, the Trial Court's belief that the law of this Circuit requires the Government to turn over to the defendant as *Brady* material information favorable to him but which he has knowledge of and can utilize is misplaced (Br. .....).

It also is indicated by defendant that the Trial Court felt that the Government specifically should have indicated early in the proceedings its intent to rely on the aiding and abetting statute (Tr. 901, 962). However, the Trial Court acknowledged that the law does not require the Government to do so (Tr. 742) and then proceeded to disallow the Government's request to charge the jury as to aiding and abetting (Tr. 748).

Lastly, defense counsel concludes with references by the Trial Court as to its views as to the merits of defendant's arguments for appeal purposes. The Government welcomes this Court to evaluate its case against the defendant and its procedures used during all proceedings in light of the entire record of all of the evidence presented. We are confident that this Court will agree with the Trial Court that

> ... justice has been done in the overall circumstances. (Tr. 971).

Conclusion

The Government's brief evinces that the prosecution of the defendant was fair and non-prejudicial and that the resulting conviction was based on the overwhelming evidence established against him. In light of the above presentation, a reversal of the conviction of defendant Maurice Burse, would, in the words of a member of this Court, "undermine respect for the administration of justice". *United States v. DeAngelis, supra* at 1011.

For the reasons set forth, the Government requests that conviction of defendant Maurice Burse be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

RE: U. S. A.
v.
Maurice Burse
Docket No. 75-1388

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 18 day of February, 1976 I mailed 2 copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to:

R. William Stephens, Esq.

10 Lafayette Square

Buffalo, New York 14203

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

William M. Skretny, First Assistant U. S. Attorney,

502 U. S. Court House, Buffalo, New York 14202

Leslie R. Johnson

Sworn to before me this

18 day of February, 1976

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 77